No. 14875

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEN GREENBLATT,

Appellant,

vs.

ERNEST R. UTLEY, Trustee in Bankruptcy for MOSES A. FLEMING, a bankrupt,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 14873

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APPELLEE'S BRIEF.

Statement of Case and Issues.

In drafting his "Statement of Facts" the Appellant apparently forgot that the Trial Court found contrary to the affirmative allegations of his answer.

We believe, however, it would serve no useful purpose to point out each of the several errors since they will be apparent to this Honorable Court from the reading of the record.

The Appellant advanced two contentions or grounds for the reversal of the District Court. We shall answer these in the order in which they are presented in Appellant's Opening Brief.

ARGUMENT.

I.

The Transfer by the Bankrupt to the Appellant of His $9,500.00 Interest in the Promissory Note Constituted a Bankruptcy Preference.

The uncontradicted evidence shows: That on and prior to February 19, 1953, the Appellant was indebted to the bankrupt in the sum of $33,000.00; that this indebtedness was evidenced by a promissory note, secured by a deed of trust, payable to the order of the bankrupt. (App. Op. Br. p. 11.)

That the bankrupt had assigned said promissory note and the security therefor to one H. B. Benner to secure an indebtedness of the bankrupt to said H. B. Benner in the sum of $6,000.00. [Findings, p. 10; App. Op. Br. p. 13.]

That thereafter and prior to February, 1953, the bankrupt had made further partial assignments of said promissory note and the security therefor to other creditors, with the knowledge and consent of the Appellant and Benner, so that on February 19, 1953, the bankrupt's remaining interest in the note and security was admittedly the sum of $9,500.00. [Rep. Tr. p. 54, lines 7-17; p. 90, line 9, to p. 91, line 20.]

That on February 19, 1953, and within the period of four months next preceding the date of filing of the petition in bankruptcy, the bankrupt was indebted to the Appellant for the sum of $8,200.00 on account of subdivision improvements installed on real property belonging

to the bankrupt, plus an additional $1,300.00 or a total of $9,500.00. [Tr. of Rec., Vol. 1, p. 6, lines 20-25.]

That on said day of February 19, 1953, while the bankrupt was so indebted to the Appellant for said sum of $9,500.00 the bankrupt, at the Appellant's request, transferred to the Appellant the bankrupt's $9,500.00 interest in the aforesaid note in full satisfaction and payment of said $9,500.00 debt.

As the Court said in *D. L. Shafter Estate Co. v. Mooney* (1927), 19 F. 2d 836 at p. 837, relied upon by the Appellant and cited on page 19 of Appellant's Opening Brief:

> "To constitute a preference, the payment in question must have been out of funds belonging to the bankrupt, and have operated to diminish his estate."

Here the bankrupt in question unquestionably owned a $9,500.00 interest in said $33,000.00 note and the security therefor. Everyone concerned, including the Appellant, admitted it. So that $9,500.00 interest in the note and security on February 19, 1953, constituted a part of the bankrupt estate—"part of the funds belonging to the bankrupt."

Clearly, then, the bankrupt's pre-existing obligation to the Appellant was paid on that day to the Appellant by the bankrupt's agent, Benner, "out of funds belonging to the bankrupt."

II.

The Appellant's Contention That He Gave Up His Right to Assert a Valid Mechanic's Lien Is Without Foundation.

The Appellant introduces his "Mechanic's Lien" contention at the top of page 21 of his brief with the interesting statement that

> "The within point is more germane and more general in its application than the preceding point. It is predicated upon the assumption, without any concession, that the credit or payment which is the basis of the alleged preference, was made from assets legally belonging to the bankrupt. Since it is less technical and more equitable in scope, than the preceding point of law, it is respectfully urged, in preference to, but without diminution of said preceding point of law."

The paragraph just quoted from the Appellant's brief is, we submit, in effect an admission that his Point I is devoid of merit. Of course we agree, and we submit further that the "Mechanic's Lien Point" (Point II) is equally without foundation.

The admitted facts are that prior to any improvements made by the Appellant on the bankrupt's real property and at all times thereafter until the transfer in question, the Appellant was indebted to the bankrupt at least to the extent of the bankrupt's conceded $9,500.00 interest in the Appellant's $33,000.00 note.

It is also admitted that the value of the improvements did not exceed $8,200.00.

Section 1193(y) of the California Code of Civil Procedure relating to Mechanics' Liens provides that the lien can exist only in cases where there remains some balance unpaid, "after deducting all credits and offsets." It

requires no extended argument to point out that the obligation of $8,200.00 in improvements for which the Appellant contends he was entitled, to claim a mechanic's lien did not exist after "deducting all just credits and offsets"—namely, the $9,500.00 admittedly then owing by the Appellant to the bankrupt.

To state it another way, the Appellant could not have claimed a valid lien under the Mechanic's Lien law of California, simply because he never could have made oath that any balance remained due him for improvements, "after deducting all just claims and offsets," as required by Section 1193(y) of the California Code of Civil Procedure.

It might be added furthermore, that the evidence did not support the Appellant's claimed defense.

Conclusion.

The facts involved were largely undisputed. Where contradiction existed in the evidence, the District Court resolved the conflicts in favor of the Appellee. The Trial Judge's Findings when based on conflicting evidence, will not be disturbed by this Honorable Court except where found to be "clearly erroneous." The Findings of Fact are well supported by the evidence and the Conclusions of Law properly to be drawn therefrom called for the judgment hereunder rendered.

That Judgment should be approved.

Respectfully submitted,

BURKE MATHES,
Attorney for Appellee.